

**Lamar Advertising Associates of Dayton d/b/a
Lamar Outdoor Advertising and Local Union
639, Sign, Display & Allied Trades, AFL-CIO.**
Cases 9-CA-14580, 9-CA-14652, 9-CA-4683,
and 9-CA-15035

July 22, 1981

DECISION AND ORDER

On December 10, 1980, Administrative Law Judge Marvin Roth issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in support of the Administrative Law Judge's Decision.

The National Labor Relations Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings,¹ findings,² and conclusions of the Administrative Law Judge and to adopt his recommended Order.³

¹ Respondent has excepted to the Administrative Law Judge's ruling excluding extensive documentary evidence regarding wage increases to employees during the period from late 1978 through July 1980. Respondent offered this evidence in order to corroborate testimony of its witnesses which indicated that Respondent had no system of scheduled pay increases. The Administrative Law Judge, in his Decision, agrees with Respondent that "[t]he company did not have a policy of granting pay increases at specific times or intervals." Therefore, Respondent was not prejudiced by the Administrative Law Judge's exclusion of this evidence. Accordingly, we find no merit in Respondent's exception.

Nor do we find merit in Respondent's contention that, because the Administrative Law Judge generally discredited Respondent's witnesses and credited the General Counsel's witnesses, his credibility resolutions are erroneous or attended by bias or prejudice. *N.L.R.B. v. Pittsburgh S.S. Company*, 337 U.S. 656 (1949).

² Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

We have also considered Respondent's contention that the Administrative Law Judge has evidenced bias and prejudice against Respondent, as manifested by his evidentiary rulings, factual inferences, and legal analysis. We have carefully considered the record and the attached Decision and reject these charges.

³ Respondent has requested oral argument. This request is hereby denied as the record, exceptions, and briefs adequately present the issues and positions of the parties.

On March 5, 1981, Respondent filed with the Board a "Motion for a Decision Sustaining the Exceptions Filed Herein," based on the failure of both the General Counsel and the Union to file either a brief in support of the Administrative Law Judge's Decision, or an answering brief to Respondent's exceptions. Respondent contends that this failure indicates that there is no opposition to its exceptions. On March 16, 1981, the General Counsel filed with the Board a motion to strike Respondent's motion, contending that the Board's Rules do not support a request for judgment "based on the silence of the non-excepting party."

On April 16, 1981, Respondent filed with the Board a "Reply to General Counsel's Motion to Strike," urging that we overrule the General Counsel's motion. National Labor Relations Board Rules and Regulations, Series 8, as amended, Sec. 102.46(d), states that "a party opposing the exceptions *may* file an answering brief to the exceptions." (Emphasis supplied.) Neither this section nor any other section of our Rules and Regulations or Statements of Procedure requires a party to file a brief opposing exceptions in order to preserve its opposition to them. Accord-

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Lamar Advertising Associates of Dayton d/b/a Lamar Outdoor Advertising, Dayton, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, except the attached notice is substituted for that of the Administrative Law Judge.

Accordingly, we grant the General Counsel's motion to strike Respondent's motion.

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT discourage membership in Local Union No. 639, Sign, Display & Allied Trades, AFL-CIO, or any other labor organization, by discriminatorily terminating employees, or in any other manner discriminating against them with regard to their hire or tenure of employment or any term or condition of employment.

WE WILL NOT discharge or discipline employees for joining with their fellow employees in questioning or criticizing their terms and conditions of employment, or for otherwise engaging in protected concerted activities with regard to their terms and conditions of employment.

WE WILL NOT tell employees that other employees will be terminated because of their union activities, or that our plant will never be a union shop, or that our employees have no right to know wage rates at other plants.

WE WILL NOT threaten you with loss of jobs, less pay, loss of retirement benefits, or worse working conditions if you choose or keep Local 639, or any other labor organization, as your bargaining representative.

WE WILL NOT expressly or impliedly promise or announce wage increases or other bene-

fits in order to discourage support for Local 639 or any other labor organization.

WE WILL NOT question you concerning your union membership, attitude, or activities, or those of your fellow employees.

WE WILL NOT spy on union meetings or other union activities.

WE WILL NOT create the impression of spying on employee union activity by accusing employees of engaging in such activity.

WE WILL NOT fail or refuse to bargain collectively with Local 639 as the exclusive collective-bargaining representative of all full-time and regular part-time employees employed by us at our Dayton, Ohio, location (exclusive of all office clerical, sales, and professional employees, and guards and supervisors as defined in the Act) by failing or refusing to furnish said Union with information which is relevant and necessary to its function as such representative.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of your right to engage in union or concerted activities, or to refrain therefrom.

WE WILL offer Ricky Kuck, Joseph T. Horn, Jr., and Dallas Wayne Farley immediate and full reinstatement to their former jobs, or, if such jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights previously enjoyed, and make them whole for losses they suffered by reason of the discrimination against them, with interest.

WE WILL promptly furnish Local 639 with current information concerning rates of pay, wage data, and fringe benefits offered and paid by Lamar Corporation, its subsidiaries and affiliates engaged in the United States in the business of selling and displaying outdoor advertising, for employees performing work in job categories which are comparable or identical to those in the above-described bargaining unit.

LAMAR ADVERTISING ASSOCIATES OF
DAYTON D/B/A LAMAR OUTDOOR
ADVERTISING

DECISION

STATEMENT OF THE CASE

MARVIN ROTH, Administrative Law Judge: These consolidated cases were heard in Dayton, Ohio, on August 5, 6, and 7, 1980. The charges were filed on November 21 and December 13 and 20, 1979, and March 13, 1980, respectively, by Local Union 639, Sign, Dis-

play & Allied Trades, AFL-CIO, herein the Union. The amended consolidated complaint, which issued on April 30, 1980,¹ and was further amended at the hearing, alleges that Lamar Advertising Associates of Dayton d/b/a Lamar Outdoor Advertising, herein Respondent or the Company and sometimes Lamar-Dayton, violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act, as amended. The gravamen of the complaint, as amended, is that the Company allegedly: discharged employee Ricky Kuck because of his protected concerted activities; discharged employees Joe Horn, Carl Gray, and Dallas Farley because of their union activities; threatened and interrogated its employees, and promised and granted them benefits, in order to discourage support for the Union; engaged in surveillance and created the impression of surveillance of employee union activity; and failed and refused to furnish the Union, as the certified collective-bargaining representative of its employees, with information necessary and relevant to the Union's performance of such function. The Company's answer denies the commission of the alleged unfair labor practices. All parties were afforded full opportunity to participate, to present relevant evidence, to argue orally and to file briefs. The General Counsel and the Company each filed a brief.

Upon the entire record in this case² and from my observation of the demeanor of the witnesses, and having considered the arguments of counsel and the briefs submitted by the General Counsel and Respondent, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

The Company, a partnership with an office and place of business in Dayton, Ohio, is engaged in selling and displaying outdoor advertising. In the operation of its business, the Company annually provides services valued in excess of \$50,000 for other nonretail enterprises within Ohio, each of which is engaged in interstate commerce. I find, as the Company admits, that it is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION AND UNIT INVOLVED

The Union is a labor organization within the meaning of Section 2(5) of the Act. On January 3, following a Board-conducted election (Case 9-RC-13173) the Union was certified by the Board as the exclusive collective-bargaining representative of the Company's employees in an appropriate unit consisting of all full-time and regular part-time employees employed by the Company at its 112 North Grimes Street, Dayton, Ohio, location, excluding all office clerical employees, sales employees, professional employees, guards, and supervisors as defined in the Act. It is undisputed that at all times since January 3, the Union has been and is the exclusive bar-

¹ All dates herein refer to the period of July 1, 1979, through June 30, 1980, unless otherwise indicated.

² Certain errors in the transcript have been noted and corrected.

gaining representative of the employees in the appropriate unit.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Refusal To Furnish Information

Chronologically, the refusal to furnish information is the last alleged unfair labor practice. However, as the contentions of the parties necessitate some consideration of the Company's overall structure, including its relationship to Lamar Corporation, I shall deal first with this matter.

The Company is one of some 19 subsidiary companies of Lamar Corporation, based in Baton Rouge, Louisiana. The subsidiary firms are located throughout the United States, but predominantly in the South. The Company, i.e., Lamar-Dayton, is unique among these subsidiaries in that it is owned by a partnership of Lamar Corporation and an individual investor. However, the investor functions as a silent partner, in that he plays no role in the day-to-day operations of the business. Rather, pursuant to an operating agreement with Lamar Corporation, he has contracted for Lamar Corporation to manage the Dayton operation. The Company is engaged in the outdoor advertising business in the Dayton area. Specifically the Company leases land, builds boards on the land, sells the boards to advertisers, and services the boards by posting or painting advertising signs and by maintaining such signs. Harry Gammill, who was presented as an adverse witness for the General Counsel and as the Company's principal witness, identified himself as general manager and vice president of Lamar-Dayton. As a company witness, Gammill variously testified that Lamar-Dayton had no president, that he was vice president only in Dayton, that he was not an officer of Lamar Corporation, that he established the wages, hours, policies, and procedures at Dayton, and that administratively he did not report to anyone and was not responsible to anyone, except to the extent that he was expected to operate profitably. However, at other points in his testimony Gammill admitted that Ken Reilly was president of "Lamar Outdoor Companies" and specifically that Reilly was probably the president of all the subsidiaries. Gammill further admitted that every general manager of a subsidiary is a vice president of Lamar Corporation. Gammill also admitted that he answered to Reilly and to Jerry Marchand, who was in charge of Lamar Corporation's outdoor advertising division. As will be indicated at various points in this Decision, these were not the only matters on which Gammill gave contradictory testimony. Rather, Gammill demonstrated a propensity to give shifting, contradictory, or patently false testimony, or to become evasive about material matters.

The Company holds itself out to the public as one branch of the Lamar chain of operations. Thus, the Company indicates in its stationery that it maintains offices throughout the United States, and that it has been in business for 75 years, although Lamar-Dayton has been in operation for only 6 years. The evidence further indicates that in many respects Lamar Corporation maintains common personnel policies for all its subsidiaries. Lamar Corporation maintains one hospitalization plan and one

retirement plan for all personnel, and one safety manual, issued by the home office in Baton Rouge, is utilized by all Lamar companies. The evidence further indicates a significant interchange of personnel at the managerial level. Gammill himself served as a sales manager in Baton Rouge before coming to Dayton as general manager. While maintaining his office in Dayton, Gammill also acted as manager of a Lamar facility in Muncie, Indiana, although that facility was owned by Lamar Corporation until May 1980, when Lamar Corporation transferred ownership to Lamar-Dayton. In the meantime John Reed (of whom more will be said later) switched back and forth in various managerial capacities between Muncie and Dayton. Gammill periodically attends management meetings in Baton Rouge. The Baton Rouge home office processes the payroll and performs other invoicing and bookkeeping services for Lamar-Dayton, for which Lamar Corporation bills the subsidiary. Paychecks are issued in the name of Lamar Corporation. As indicated, Gammill testified that he set the wage rates at Dayton. However, he admitted that only Baton Rouge, and specifically Reilly and Marchand, determined his own compensation. Moreover, other evidence, including admissions by Gammill and the uncontroverted testimony of other witnesses, indicates that Baton Rouge exercised substantial control over the wage rates at Dayton, and that in determining wage rates and other conditions at Dayton, Gammill attached greater comparative significance to prevailing conditions at other Lamar facilities than to prevailing conditions at competing firms closer to the Dayton area. Specifically, Gammill testified that in December 1979 he granted wage increases to the Dayton construction crew after the home office informed him that funds would be released for a full scale conversion from the "long handle" to "short handle" method of installing signs (the construction crew being responsible for that conversion operation). During the election campaign Gammill showed the employees copies of a union contract at a Lamar facility in Orlando, Florida, indicating that this was what they could expect if they voted in the Union. However, at a previous meeting (which will be discussed in connection with the termination of Ricky Kuck), Production Supervisor Rick Boyd indicated that the Company took a dim view of comparison with union wage rates for bill posters employed by other firms in Ohio or nearby States. Indeed, the evidence indicates that the Company's adherence to its incentive wage plan for bill posters was a major factor in bringing about the present union campaign. While such a plan, in which wages were based on employee production might have been successful in the warmer climates where Lamar Corporation maintained most of its facilities, the Company either failed to realize or chose to disregard that with the onset of a midwestern winter, the bill posters might be concerned that their income would be seriously diminished.

On January 17, 1980, 2 weeks after the Union's certification, Union Business Representative Frank Rich, by letter to Vice President Gammill, requested certain personnel information and information concerning classifications, wages, benefits, and plant rules at the Dayton fa-

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cility. Rich also requested "wage data concerning other plants of Lamar Outdoor Advertising [union and non-union]." Rich asserted that all of the information "would enable us to properly and understandingly perform our duties in the general course of negotiations." The Company subsequently furnished the requested information concerning the Dayton facility. However, at a bargaining session on January 17, and by letter dated February 15 from the Company's attorney, Hall, to Rich, the Company declined to comply with the remaining request. Hall asserted that the request was improper because the Union was certified to represent only the Lamar-Dayton unit. By letter dated February 18 from the Union's attorney, Shaw, to the Company's attorney, Hall, Shaw, on behalf of the Union, requested "wage and fringe benefit offerings for all plants owned and operated by Lamar Outdoor Advertising." Shaw asserted that such information "is necessary to conduct negotiations in an expeditious manner and that we are entitled to it as a matter of law." By letter dated March 7 Shaw denied the request, asserting that the Company was not required to give information "relating to the employees of other employers regardless of the direct or indirect connection with Lamar." The parties restated their positions at subsequent bargaining sessions, and the Company further asserted that "Lamar Outdoor Advertising" owned no plants other than Dayton. On June 12 the Company and

meaning of the Act. See *N.L.R.B. v. Master Slack and/or Master Trousers Corp., et al.*, 618 F.2d 68 (6th Cir. 1978); *N.L.R.B. v. Big Bear Supermarkets No. 3*, 640 F.2d 924 (9th Cir. 1980). As indicated, the Union requested information for all plants of "Lamar Outdoor Advertising," which is the name under which the Company conducts its business. However, that name is descriptive of all Lamar facilities which are engaged in the business of outdoor advertising. The Company represented to the public that it was one of a chain of facilities, and Vice President Gammill testified that Ken Reilly was president of "Lamar Outdoor Companies." It is evident that the Company understood that the Union's request for information referred to all Lamar facilities engaged in the outdoor advertising business. Therefore the Union properly identified the requested information. As vice president and general manager, Harry Gammill had access to the requested information. Indeed Gammill obtained copies of Lamar's union contracts for use in the representation election campaign. Therefore the Union's request was properly directed to Gammill and to the Company's attorney.

However, as the Company points out in its brief, this is not the end of the inquiry. Information concerning the wages and benefits of unit employees is presumptively relevant to the performance of the Union's collective-

shown, and that the Company violated Section 8(a)(5) and (1) by failing and refusing to furnish the Union with information concerning rates of pay, wages paid, and fringe benefits offered and paid by Lamar Corporation, its subsidiaries and affiliates engaged in the business of outdoor advertising, to employees performing work in job categories which are comparable or identical to those in the bargaining unit. *Press Democrat Publishing Company, supra*; see also *K-Mart Corporation v. N.L.R.B.*, 626 F.2d 704, 707-708 (9th Cir. 1980), citing *General Electric Co. v. N.L.R.B.*, *supra*. Although the Company and the Union have negotiated a collective-bargaining contract, the Union's request is not moot. The requested information would be pertinent to future contract negotiations. Therefore a remedial order is warranted.

I shall at this point return to the unfair labor practices allegedly committed by the Company prior to the refusal to furnish information. As consideration of some of these allegations necessarily involves consideration of the alleged supervisory status of certain individuals, I shall first address myself to the status of these individuals

B. The Alleged Supervisory Status of Rick Boyd, Ron Tyree, and Alleged Discriminatee Joseph Horn

There are and usually have been at all times material, some 12 to 14 employees in the unit which is presently covered by the collective-bargaining contract. The unit comprises employees in the three categories of billboard constructors (also known as the construction crew), billposters, and painters. The Company also utilizes individual employees in other work, e.g., an electrician and a paper folder, and employs grass cutters on a part-time basis. The painters normally work in the shop, whereas the construction and billposting crews perform most of their work in the field. At all times material, i.e., at least since the spring of 1979, Harry Gammill has been general manager and in charge of the Dayton facility, and Hal Ward has been sales manager at Dayton. It is undisputed that at all times material Gammill and Ward have been and are supervisors within the meaning of the Act. The Company also has a position known as "production superintendent." According to Gammill, the production superintendent is a supervisor who is in charge of the work of all hourly rated personnel; i.e., the unit employees. However, that position has not always been filled. Additionally, the Company's supervisory personnel collectively comprise an "operational committee" which meets weekly to decide what work shall be done that week, and also to discuss and deal with operational problems. John Reed, who was presented as a company witness, testified that he was "assistant sales manager" and in charge of the Lamar Muncie facility from August 1, 1978, to January 2, 1980, that he was production superintendent before going to Muncie, and that he was again production superintendent at Dayton from January 2 to June 2, 1980, when he was terminated. As will be discussed, I find that the position of production superintendent as described by Gammill was in fact created in September 1979 as an accommodation to Rick Boyd, and that Reed's authority, at least upon his return to Dayton, was substantially limited to shop personnel, i.e., with respect to the unit, the painting employees.

Harry Gammill testified that in 1979 the operational committee consisted of himself, Sales Manager Ward, Construction Superintendent Rick Boyd, and Posting Superintendent Joe Horn. Boyd and Horn were in charge of the construction and bill posting crews, respectively. There is no indication that at any time from August 1, 1978, to September 1979, anyone held the position of "production supervisor." Gammill testified that "as a construction foreman," Boyd had the right to hire and fire employees, assign work, and grant time off. On April 25, 1979, Boyd was seriously injured in an on-the-job accident. He did not return to work until September. There were normally from three to six employees in the construction crew. At the time of the accident the crew consisted of Ron Tyree, Lewis Baker, and alleged discriminatee Carl Gray. General Manager Gammill testified that the day after the accident he met with the construction crew, and they agreed that there would not be a construction superintendent, but that Tyree, who had the greater experience at construction work, would serve as a "communicator" between the operational committee and the crew. Gammill testified in sum that Tyree did not have a specific title, but that he served as a communicator in that he received and transmitted work assignments to the employees. All of the crew were given raises. Gammill's testimony was substantially corroborated by Baker and Gray, who were presented as the General Counsel's witnesses. (Tyree, who quit his employment with the Company in January 1980, was not presented as a witness by any party.) However, in the ensuing months Tyree, who evidently regarded himself as a boss, took charge of the work in the field, and this caused some friction among the crew. Tyree directed work in the field to the extent it required some direction, e.g., splitting up the crew or assigning the operation of the crane (sometimes to himself). Indeed Gammill referred in testimony to Tyree as a "crew chief" or "head of our work group." However, the evidence fails to indicate that Tyree had authority to hire, fire, or effectively discipline employees, or to effectively recommend personnel action, although from time to time he would complain to management about employees, or recommend pay raises.

Rick Boyd returned to work in early September. However, he was not yet physically able to work in the field. Boyd was designated production superintendent, which as indicated was a supervisory position which placed him in overall charge of all hourly rated personnel. At a meeting on October 26, the operational committee demoted Joe Horn to a rank-and-file billposter, and the billposting crew was subsequently informed that Boyd (who retained his position as production superintendent) would be in charge of the crew. The circumstances of Horn's demotion, and the work performed by him after his demotion, will be discussed in detail in connection with the alleged unlawful terminations of Horn and Ricky Kuck. The evidence fails to indicate that anyone ever replaced Horn in the capacity of "posting superintendent." By December Boyd was physically able to return to the field. Gammill testified that Boyd returned to the field as construction foreman in early De-

cember. Boyd testified that this change took place during the second week of December. Boyd did not receive a reduction in pay either when he allegedly transferred to the field or after John Reed transferred to Dayton, he continued to serve on the operational committee, and he continued to maintain an office at the plant where he spent much of his time. As indicated, Gammill testified that as Construction Foreman Boyd had authority to hire and fire employees. It is undisputed that after his alleged return to the field, Boyd did in fact exercise such authority. On December 15, Boyd discharged construction employee Carl Gray. At the time, Boyd was in his office while the crew was working in the field. Gammill testified that Boyd reported the matter to him on the following Monday (December 17) and that Boyd had the authority to terminate Gray. It is evident that at least until January 2, 1980, Boyd, whatever his title or extent of authority, was a supervisor within the meaning of the Act. Gammill testified that in January Boyd had no authority to hire and fire, because the Company had a production superintendent; i.e., John Reed. However, Gammill admitted that Boyd had authority to responsibly direct the work of employees and to recommend pay increases. Boyd testified that as of January 9 he did not have the power to hire and fire because "I was becoming part of the Union," and that he discussed this matter with Gammill. According to Boyd, he exercised supervisory authority only during his first tenure as construction foreman; i.e., prior to the accident. However, as indicated, Boyd exercised supervisory authority by discharging Carl Gray on December 15. The Company's records indicate that on January 11 Boyd authorized a pay increase for electrician Randy Arner. The date is significant because (1) John Reed testified that he became production superintendent on January 2, and (2) the General Counsel alleges that Boyd engaged in surveillance of a union meeting on January 9, and that his actions constitute evidence that the subsequent termination of employee Dallas Farley was discriminatorily motivated. In fact the Union never regarded Boyd as part of the bargaining unit. Boyd either did not vote in the representation election or his vote was challenged. When Boyd showed up at the January 9 meeting, Union Business Representative Rich promptly requested him to leave, on the ground that he was part of management. According to Gammill and Boyd, Boyd resumed his position as production superintendent when John Reed was terminated.

I find that at all times material, and specifically from his return to work in September until the time of the present hearing, Rick Boyd was a supervisor and agent of the Company within the meaning of the Act, and that at all times he was fully aware of his supervisory authority. The only significant change in his status was that beginning in December 1979 he spent more of his time in the field. The Company may have found it expedient to exercise more supervisory authority in the field, particularly with respect to the construction crew, as the crew was then engaged in the work of converting to the short-handle method of operation. I further find, with respect to Joe Horn, that he was not a supervisor or managerial employee from the time of his demotion until his discharge on November 21. The evidence indicates that

Horn possessed some indicia of supervisory authority prior to October 26. However, as he was not a supervisor after October 26, it is unnecessary for me, in deciding the issues presented in the case, to determine whether, as posting superintendent, Horn was a supervisor within the meaning of the Act. As for Ron Tyree, the evidence falls short of proving that, at any time, Tyree was a supervisor within the meaning of the Act. Tyree enjoyed his authority under an *ad hoc* arrangement whereby, as a result of his experience, he emerged as a group leader. The construction crew performed substantially unskilled work of a routine nature, which required minimal direction on the job. The authority exercised by Tyree consisted of routine instructions in the field in performing jobs which were assigned from the plant. The evidence fails to indicate that Tyree was involved in personnel decisions which required the exercise of significant supervisory discretion. If Tyree exercised supervisory authority over the construction crew prior to December 1979, then he had little occasion to do so after early December, when Rick Boyd returned to the field. Indeed it was Boyd and not Tyree who was in charge of the construction crew when Carl Gray was discharged. Tyree's own actions and statements with regard to the representation campaign tended to indicate that he did not consider himself to be a part of management. The Company, and specifically General Manager Gammill, vigorously and vocally opposed unionization. However, Dallas Farley testified that Tyree's expressed views about the Union seemed to depend on who was present when he was talking. In contrast, no witness suggested that Rick Boyd was ever ambiguous about his opposition to the Union. At the election on December 21, Tyree cast a void ballot by voting both ways. Moreover, the Union indicated that it considered Tyree to be an employee within the unit. The Union did not challenge his ballot and Frank Rich did not request him to leave when he accompanied Rick Boyd to the union meeting on January 9. I find upon the evidence that Tyree was not a supervisor of the Company within the meaning of the Act. See *Tri-County Electric Cooperative, Inc.*, 237 NLRB 968 (1978); *John Cuneo of Oklahoma, Inc.*, 238 NLRB 1438 (1978).

The complaint alleges that on or about December 10, the Company, by Tyree, interrogated an employee regarding his union activities and threatened an employee with discharge if he should support the Union. Employee Lewis Baker testified that in conversations Tyree asked him how he felt about the Union. Employee Lewis Williams testified that Tyree asked him how he would vote in the representation election. Carl Gray testified that about December 10 Tyree accused him of voting for the Union, i.e., signing a union card, and told Gray that Tyree could not vote for the Union because he would lose his job. I credit the uncontradicted testimony of the employees. However, I find that Tyree was speaking for himself and not as an agent of the Company. Therefore, I am recommending that the allegations of paragraph 5(c) of the complaint be dismissed.

C. The Termination of Ricky Kuck

Ricky Kuck worked for the Company on the bill posting crew from August until his termination on October 29. In October the crew consisted of Billposting Superintendent Joe Horn, billposters Gary Watson, Bernie Horton, and Jack Kelly, and Kuck, who was a billposter trainee. The crew worked in the field, applying paper advertising material to the metal boards. Superintendent Horn received a salary, and Kuck, because he was still a trainee, received an hourly wage. However, the other billposters were covered by an incentive program whereby they were paid on the basis of their production output. The Company instituted this incentive program for billposters in April 1979 and it remained in effect until the Company and the Union executed the present collective-bargaining contract. However, new billposters, i.e., trainees, received an hourly wage until they completed their on-the-job training and were therefore considered capable of going under the incentive program. General Manager Gammill initially testified that the training period was 6 to 9 months. However, he subsequently testified that it was 3 to 9 months, and possibly shorter. Joe Horn, who was in the best position to know, testified that there was no set policy, but that the training period usually lasted from 2 to 5 months, and that, if an employee were not qualified to be a billposter that fact would become apparent in 1 to 2 months. Jack Watson, who began as a billposter in March 1979, testified that both he and Lewis Baker (who transferred to the crew in December 1979) were trainees for about 2 months. As for Kuck, Joe Horn testified that he was doing fairly well. Gammill and Sales Manager Ward conceded, in sum, that on the basis of Horn's reports they understood that Kuck was a good employee and that they did not receive any adverse reports about him. Rick Boyd, who took charge of the bill posting crew on the day of Kuck's termination, and had no personal knowledge of Kuck's performance, testified that, after Kuck's termination, "everybody" told him that Kuck "could not make it as a billposter." Boyd attributed this alleged information to employees Bernie Horton and Lewis Williams. Boyd's testimony was uncorroborated by any other witness. Williams did not begin working as a billposter until late November. Gary Watson testified that by October Kuck was performing on his own, all but the most difficult work; i.e., boards over 20 feet high. A week before his termination Kuck was given a 25-cent-per-hour pay increase. I find that as of October 29, the Company regarded Kuck as a capable employee, and anticipated that within the short period of time he would complete his training period and go under the incentive program.

The incentive program itself was a source of considerable discontent among the bill posting crew. Although originally reduced to writing, the Company had revised the plan from time to time, and there was considerable confusion among the employees concerning its application. On its face, the plan made no provision for such conditions as lack of supplies, or more importantly, inclement weather, which would curtail the availability of bill posting work. The employees looked forward to the coming winter (the first under the incentive plan) with

considerable concern. In late September Kuck, Watson, and Horton began talking among themselves about the possibility of a union. They decided to contact the Union and Kuck was the first to do so. Kuck testified that on October 10 he met with Business Representative Rich, signed a union authorization card, and obtained additional blank cards from Rich. However, Kuck admitted that he kept the cards at his home for about a month. Kuck testified that in the meantime he talked to other employees about union wages and benefits, but did not vocally advocate unionization. Eventually Kuck turned the cards over to Bernie Horton, who solicited and obtained signed cards from most of the Company employees. I find that these events actually occurred. However, I find, in light of the evidence, that the organizational activity actually occurred after Kuck's termination. As indicated, Kuck admitted that he kept the cards for about a month. At one point Kuck testified that he gave the cards to Horton on Friday, October 19. However, in view of the fact that Kuck and other of the General Counsel's witnesses were proceeding on the mistaken assumption that Kuck was terminated on Monday, October 22, whereas in fact the termination, and the meetings which preceded that termination (which will be discussed) took place on October 29. Therefore Kuck's choice of date is questionable. Horton testified that he solicited the authorization cards in the washroom and on the loading dock of the plant, and that all of the employees, including Joe Horn, signed cards. However, Horn, who was demoted on October 26 and was not at work on October 29, testified that Watson and Horton approached him after his demotion, and that he signed a card at a later date (according to his affidavit, on November 8). Kuck testified that the signed cards were returned to Business Representative Rich in early November. None of the cards were presented in evidence. This fact tends to suggest that had the cards been introduced the dates therein would have been adverse to the General Counsel's case. The fact that Kuck did not personally solicit any signed cards, further tends to indicate that he was probably no longer working at the plant. On November 21, Rich demanded recognition of the Union, based on the support manifested by the cards. In sum, I find that the organizational campaign probably occurred during the period from October 30 through mid-November.

The evidence further indicates that the campaign was conducted in a clandestine manner. Employees Horton, Williams, and Baker testified that there were understandings that certain persons would not be told about the campaign. Horton specifically testified that he, Baker, Watson, and Kuck agreed that they should not talk about the campaign to Boyd, Tyree, or employees Randy Arner and Cliff Leininger. General Manager Gammill testified that he first learned of the union activity when Business Representative Rich came to his office on November 21. As will be discussed, Rick Boyd made an admission which indicates that immediately after Kuck's termination, he had reason to suspect that some clandestine activity was underway. However, in light of the evidence, including the Company's actions and state-

ments which will be discussed, *infra*, I find that although the Company may have suspected that there was incipient organizational activity, the Company did not have solid information about the campaign until Rich's visit.

On Monday, October 29, there was insufficient work for the billposting crew. It was raining that day. However, there was also no paste for billposting work. (According to Gammill, the latter was attributable to Joe Horn, who as billposting superintendent had been responsible for ordering the paste and assuring that there was enough on hand.) Whatever the cause (and it may well have been both factors) the situation called to the attention of the employees their own growing concern about their method of compensation. At or about 8:30 a.m., Rick Boyd summoned the billposting crew (Kuck, Kelly, Horton, and Watson) into his office. According to Kuck, Boyd announced that Horn was demoted from posting superintendent, that he was not firm enough with the employees and not doing his job, that he would be just a regular billposter, and that Boyd would be in charge of the crew. Boyd asked if he could do anything. Horton asked how they were going to get paid in winter, asserting that incentive was not enough, and pointing out that the paste freezes in cold weather. According to Kuck, Kuck then asked Boyd what the union scale was for the job. Boyd answered that it was about \$7 per hour. (Kuck was then making \$3.25 per hour.) Kuck responded that he thought it was between \$8 and \$10 per hour. According to Kuck, Boyd then stated that Kuck did not have to worry about it, because "this wasn't a union shop" and "never would be." Kuck testified that the meeting lasted for about an hour. Gary Watson, who was presented as a witness for the General Counsel, substantially corroborated the testimony of Kuck concerning this meeting. According to Watson, the employees protested the announcement that Horn was being demoted and also complained about their equipment and especially about their wages. Watson testified that the employees had previously raised these problems with Horn and Sales Manager Ward. According to Watson, Kuck stated at this meeting that he felt the employees were being paid unfairly, that employees at other firms were paid up to \$10 per hour or \$200 per board for similar work, and that, in support of these assertions, Kuck cited wages at other unionized plants. According to Watson, Boyd answered that that was none of their business and they should not know what other billposters were being paid, whereupon Kuck responded: "It concerns me. I should know."

Boyd did not testify about the meeting on his direct examination by counsel for Respondent. However on cross-examination Boyd corroborated much of Kuck's testimony. According to Boyd, the employees were "angry and concerned" about the upcoming winter and the incentive program, as they were "every winter." (In fact, this was the first winter under the incentive program. Gary Watson testified without contradiction that, when the program was instituted, the employees were told that they would go back on hourly rate during the winter.) Boyd testified that Kuck was "outspoken" at this meeting, that he asked Boyd about union scale, that Kuck purported to inform Boyd of the union scale, and

that Boyd regarded his claims as "outlandish." According to Boyd, Kuck was a "loudmouth" who was outspoken at all meetings. Boyd testified that he did not announce Horn's demotion at this meeting, but that the announcement was made at a second meeting, conducted later that day by General Manager Gammill. Bernie Horton, who was presented as a witness for the General Counsel, testified that Gammill was present when the announcement was made, which would indicate that an announcement was made at the second meeting. Incredibly, and in contradiction of Boyd's testimony, Gammill testified that to his knowledge the billposting crew was never informed that Boyd was taking over the billposter superintendent's duties. Boyd, in his testimony, denied that, as alleged in the complaint he threatened the employees with unspecified reprisals if they engaged in protected concerted activities. However, he did not deny the factual basis for that allegation; namely, that Boyd allegedly told the employees that they had no right to know what other billposters were being paid. Gammill and Boyd both testified that Boyd did not tell Gammill about the 8:30 a.m. meeting.

In February 1980 Gary Watson quit his job with the Company and at the time of the present hearing he was employed at another firm. Shortly after Kuck's termination, Kuck and Watson exchanged angry words in which Kuck accused Watson and the other billposters of informing on him. Watson was demonstrably a disinterested witness who had no motivation to knowingly give false testimony favorable to Kuck. I credit the testimony of Kuck and Watson concerning the 8:30 a.m. meeting. Horn's demotion was probably mentioned at both meetings on October 29. This was the first workday following the demotion, and, in the interest of facilitating operations, it is probable that Respondent would inform the billposters as soon as possible that Boyd was now in charge of the crew. I find that Respondent, through Boyd, violated Section 8(a)(1) of the Act by telling its employees, in sum, that they had no right to know the wages of other billposters. See *Triana Industries Inc.*, 245 NLRB 1258 (1979). I find that Respondent further violated Section 8(a)(1) by telling its employees that Respondent would never be a union shop. Boyd thereby threatened that the Company would never deal with a union and sought to impress upon the employees the futility of their supporting a labor organization. Although this matter was not alleged in the complaint, the meeting in question and statements allegedly made at that meeting were fully litigated at the hearing. For reasons which will be discussed in connection with Kuck's termination, I do not credit the testimony of Gammill and Boyd that Boyd did not inform Gammill of Kuck's conduct at the meeting.

Following the 8:30 meeting the billposters milled around the shop until they were summoned to a second meeting in the conference room. Gammill, Ward, and Boyd were all present at this meeting. Kuck took a place at the meeting. However, before the meeting began, Gammill told Kuck that it was "nothing personal," but that Gammill did not want him at the meeting. Kuck testified that Gammill gave no explanation. Gary Watson

testified that Gammill told Kuck that there was nothing in the meeting that would concern him. The meeting ran through the lunch hour and lasted most of the day. In the meantime Kuck, who had no work, waited in the shop, just killing time. Respondent's supervisors testified in sum that the meeting was devoted to discussion of Respondent's conversion from long handle to short handle operation, the incentive program, and the overall operation of the posting department. It is evident from the circumstances of Joe Horn's demotion (which will be discussed) that Respondent was trying to urge the reluctant employees to accept the conversion to short handle as a solution to many of their problems.

Kuck testified that after the meeting he asked Boyd why he was excluded and Boyd answered that Kuck was laid off and no longer needed there. Kuck laughed, walked away, and approached Gammill. Kuck also asked Gammill why he had been excluded from the meeting. According to Kuck, Gammill answered that he heard that Kuck was checking on wages from other employers in the area. Kuck responded that he did so because the Company wage was so underscale, that he wanted to know "how bad I was being screwed." At this point Gammill told Kuck that "if you don't like the way things are being run around here just get the hell out." Kuck responded: "Give me my checks, and I'll be on my way." Gammill said he would do so. While Kuck was waiting for his checks he angrily accused his fellow billposters of informing on him about the Union. Superintendent Boyd testified that he overheard Kuck accuse Bernie Horton of telling on him. Therefore Boyd had reason at this point to suspect that some kind of concerted activity was underway. According to Kuck, Boyd told him that his kind was not needed around there and that he would not be missed.

In his opening argument, counsel for Respondent asserted that Respondent would show that one of the alleged discriminatees (Kuck) quit in a personal dispute with Gammill. However, Gammill categorically testified that all four employees were discharged. Gammill subsequently attempted to back away from this admission, but once again admitted that Kuck was "fired." Rick Boyd in his testimony also admitted that Kuck was discharged. Boyd denied that he told Kuck that he was laid off, or that Kuck asked him why he had been excluded from the meeting, or that he told Kuck that his kind was not needed and he would not be missed. However, at another point in his testimony Boyd gave away the game. Boyd admitted on cross-examination, in his own words, that Kuck was excluded from the meeting because "I knew by his attitude that he was not going to be there very long." I do not credit Boyd's attempt to back away from this damaging admission. Boyd testified that by "attitude," he meant that Kuck was a "loudmouth" who complained about everything, including his pay, the way the shop was run, and the condition of the equipment.

General Manager Gammill testified that he called the meeting because the employees had asked for such a meeting. Gammill further testified in sum that Kuck was excluded from the meeting because he was a trainee who was not on incentive and therefore had no reason to be

involved.⁴ This was a patently false rationalization. Kuck was about to complete his training period and go under the incentive program. Even as a trainee Kuck had an obvious interest and need for information concerning all aspects of the billposting operation, including the anticipated short-handle method of operation. Personnel Manager Ward conceded that Kuck could have learned something at the meeting. Moreover, from a nondiscriminatory point of view it made no sense to have Kuck wandering around the shop all day, excluded from a billposters' meeting simply because he was not yet on incentive. Gammill, in his testimony, professed to be unable to explain what harm would have been done if Kuck had been permitted to remain at the meeting. I credit the testimony of Kuck concerning the events which transpired on the day of his termination. I find in light of Kuck's testimony, the admissions by Respondent's witnesses, the inherently implausible explanations given by Respondent for the events of October 29, and Respondent's overall course of conduct, that Gammill excluded Kuck from the meeting because he had already decided to terminate Kuck, and because he was concerned that Kuck's outspoken views might detract from his efforts to sell the employees on the short-handle system and to persuade them of the merits of the incentive system. Kuck's inquiry following the second meeting simply afforded Gammill an opportunity to effectuate his decision, made after the first meeting, to discharge Kuck. I further find that Gammill discharged Kuck because of his outspoken and leading role in presenting the common grievances of himself and his fellow employees, checking out union rates of pay, making inquiry concerning such rates, and arguing in favor of such rates to the Company and his fellow employees. Such activity constitutes protected concerted activity under the Act. Moreover, to the extent that Kuck made inquiry concerning union rates of pay, and argued in favor of such rates, his statements and actions also constituted a form of union activity. Indeed, Kuck's outspoken assertions and inquiries at the first meeting were an extension of the billposters' initial efforts in contacting the Union. Therefore, the Company violated Section 8(a)(1) and (3) of the Act by discharging Kuck.

D. The Termination of Joe Horn

General Manager Gammill personally discharged Joe Horn on Tuesday, November 21. After the Union filed an unfair labor practice charge over Horn's termination, Respondent's counsel submitted a position letter, dated January 15, to the Board's Regional Office concerning the termination. Respondent's counsel asserted, in sum,

⁴ Gammill also gave a different version of Kuck's termination interview. According to Gammill, Kuck said that he did not appreciate not being invited to attend the meeting, whereupon Gammill responded that it was nothing personal, but only incentive people should be there. Kuck allegedly said that if there was another "damn" meeting he would make "damn" sure he was there, whereupon Gammill replied that if Kuck did not like the way they operated he could leave. Kuck said he would like to leave and was given his final paychecks about 20 minutes later. Rick Boyd testified that he overheard the conversation, but professed to be unable to recall what Kuck told Gammill. I do not credit Gammill's version of the conversation.

that Horn was a salaried employee in a supervisory position, that he was not performing his supervisory duties satisfactorily, that he was given the option of being placed on hourly and nonsupervisory status, that Horn wanted full salary, but was refused and terminated, and that at the time of his termination Respondent was not aware of any activity whereby Horn was involved with a labor organization. As will be discussed, these assertions were refuted in nearly every material respect by General Manager Gammill or other company witnesses.

As an adverse witness for the General Counsel, Gammill testified that Horn was discharged because as posting superintendent he was not getting out production and Respondent was not getting its boards posted. Gammill initially testified that this was the main reason for Horn's termination, but subsequently asserted that there were "absolutely" no other reasons. In fact, Horn was demoted from his position and replaced by Rick Boyd on October 26, some 3-1/2 weeks before his discharge. Thereafter, as admitted by Gammill in his testimony, Horn was "just a billposter" who had "no supervisory responsibilities." Even Respondent's counsel in his opening argument referred to all of the alleged discriminatees as employees and made no claim that Horn was a supervisor. Horn testified that after his demotion he became a regular billposter. Horn no longer worked in the office, he did not review production, attend meetings of the operational committee, order materials, hire personnel, or have responsibility for the company trucks. Horn's duties differed from those of the other billposters in only one respect. Horn testified that Gammill asked him to lay out the cards, i.e., to arrange the daily work assignments, for a few days until Boyd caught on as to how it was done. Horn testified that he did so for a few days and that thereafter Boyd issued the work assignments. Sales Manager Ward, in his testimony, conceded as did Gammill that Horn "was just a regular billposter," albeit more knowledgeable than the others. Nevertheless, Ward testified that on the basis of information from Boyd he learned that Horn was not cooperating with Boyd, not performing his job, coming to work late, and manifesting a poor attitude, and that at the time of Horn's discharge Boyd was still not familiar with all aspects of his job. Ward was conspicuously vague and contradictory about Horn's alleged deficiencies and was unable to explain just what Boyd needed to learn. Ward's testimony was uncorroborated by the only company witness who was in a position to have first hand knowledge of these matters; namely, Boyd himself. If in fact Boyd, who had lengthy supervisory experience, was still unable to master the details of supervising the billposting work, then this would reflect adversely on Boyd's own supervisory ability, rather than on Horn's alleged deficiencies or lack of cooperation. Indeed, Ward conceded that the work was getting done. General Manager Gammill testified that he wanted to retain Horn after his demotion, but that the other members of the operating committee, i.e., Ward and Boyd, wanted him fired. However, Ward testified that he never recommended that Horn be fired and that to his knowledge no one else made such a recommendation. As will be discussed, Gammill's own course of conduct indicates that after Horn's demotion, Gammill was

satisfied with his performance and, until the morning of Horn's discharge, anticipated that he would remain with Respondent as a valued member of the billposting crew.⁵

After Horn's demotion, there remained the open question of his compensation. Horn, who was being paid at the rate of \$6.86 per hour, did not want to go under the incentive program and so informed Gammill. Gammill told Horn that he would leave Horn on hourly for 2 weeks and that if Horn was dissatisfied after that time he could look for another job. However, Gammill and Ward, in their testimony, conceded that after more than 2 weeks had elapsed, i.e., shortly before Horn's termination, the operating committee decided to meet Horn's conditions. Gammill testified, "I changed my mind and decided to keep him on full salary." Ward testified that "it was decided that Joe would remain a regular billposter on his regular salary, and not join in the incentive program." Gammill's own notes indicate that, on November 7, he arrived at a decision that Horn would stay on the same salary until a superintendent was found. As indicated, no one ever replaced Horn in the position of posting superintendent. Gammill testified, in sum, that the operating committee met on Tuesday, November 20 (the day before Horn's discharge), and discussed Horn's status. I do not credit the testimony of Gammill that the committee then and there decided to fire Horn, nor do I credit the confused and contradictory testimony of Boyd to the effect that Gammill made such a decision. As indicated, the operating committee normally met weekly. In light of the sequence of events, the evidence discussed above, and additional evidence to be discussed, I find that on November 20 the operating committee confirmed Gammill's decision to keep Horn on at his regular salary, and that Gammill intended to notify Horn of that decision the next morning.

Following the operating committee meeting, Gammill left a message for Horn to see him in his office the next morning, without indicating a reason. Gammill drove to the Lamar Muncie plant where he spent the balance of the day. However, on the way to Muncie, Gammill telephoned his secretary, Carla Baker. Gammill asked Baker to call Baton Rouge and to get Joe's time; i.e., his wages for a 40-hour week. Gammill did not instruct Baker to make out any checks for Horn, nor did he indicate that he intended to terminate Horn. If in fact the committee had decided to fire Horn, then it is probable that Gammill would have instructed Baker to prepare final paychecks. It is also probable that this would have occurred

⁵ The General Counsel does not contend that Respondent acted unlawfully in demoting Horn from his position of posting superintendent. The record evidence suggests several factors which alone or together may have contributed to his demotion. The Company witnesses testified, in sum, that Horn was not sufficiently aggressive in leading the crew and that as a result the crew was falling behind in its work. However, Horn was also outspokenly opposed to the proposed conversation to the short-handle method of operation and at least inwardly unenthusiastic about the incentive program. Gammill, in his testimony, inferred that Horn was not presenting the Company's position to the employees. Horn expressed the view that he was demoted in order to give more authority to Boyd. Whatever the reason, the evidence indicates that after Horn's demotion Gammill was satisfied with his performance and, until learning of his union activity, anticipated that Horn would remain on as a billposting employee.

immediately to Gammill and not as an afterthought. It is also probable that Gammill would have pulled Horn's timecard. However, the timecard was in place when Horn reported to work the next morning. It is plausible that Gammill realized, as an afterthought, that it would be helpful to have Horn's weekly pay rate available in case of any questions or if Horn were dissatisfied with the arrangement. In sum, Gammill's actions were wholly consistent with a decision to keep on Horn at his present salary, but were inconsistent with his alleged intention to fire Horn.

In the meantime, following his demotion, Horn became increasingly active in the Union. He signed a union card, attended union meetings, took over the arrangement of those meetings, and volunteered to serve on the Union's in-plant organizing committee. However, prior to November 21 Respondent was unaware of his activity. At or about 8:30 a.m. on November 21, Business Representative Rich, accompanied by Ricky Kuck, arrived at the plant for the purpose of requesting recognition of the Union. They waited for Gammill to appear. After introductions, they met in Gammill's office. Sales Manager Ward came in during the meeting. Rich and Kuck testified in sum, that Rich made a demand for recognition based on the Union's card majority. After some discussion, Gammill indicated that he would not voluntarily recognize the Union, but that they would have to petition for an election. At this point Rich invoked the employees' statutory rights and proceeded to announce the names of the Union's in-plant organizers. Rich named Kuck, and then Horn, and was about to name Gary Watson when Gammill interrupted. According to Rich and Kuck, Gammill said that, as of Friday, Horn would no longer be employed there. At this point Ward came into the office. Ward inquired about union contract demands and the makeup of a negotiating committee and the employer officials made sarcastic remarks about Kuck. According to Kuck, Gammill told him "you sure do have high moral standards." Gammill, in his testimony, either substantially corroborated or failed to refute the testimony of Rich and Kuck in all but one respect. According to Gammill, he told Rich that as of 9:30 that morning (the time of Gammill's scheduled meeting with Horn) Horn would no longer be an employee. I credit Rich and Kuck, because the evidence indicates that until that moment Gammill had no intention of discharging Horn at the 9:30 meeting.

After Rich and Kuck left, Gammill was visibly angry, and yelled for Boyd to come immediately. Carla Baker described Gammill as red in the face and swearing. Gammill demanded to know if Boyd knew anything about the Union and who was behind it. Gammill told Boyd and Baker that Horn was named as having started the Union. Boyd then met with Gammill in Gammill's office. Later Horn, accompanied by Boyd, arrived for his scheduled meeting with Gammill. Sales Manager Ward was also present. According to Horn, Gammill said:

Joe, my first intention of calling you in to this meeting this morning was to try to work out something to keep you here. In fact, if we couldn't work out something, I had already gotten your pay-

checks. But this morning when I got to work, I was approached by some clown by the name of Frank Rich, Union representative. He named you, Gary Watson, and Ricky Kuck as Union organizers. I should have known when I let you bring Kuck back to work, that you would have had something planned like this. For this reason, I have no other choice but to let you go. You can run back to your little Union man and tell him everything I said. In fact, I'll even write it down on paper if you want.

After requesting comments from Ward and Boyd, Gammill gave Horn his final paychecks. At Horn's request, he was given an additional check for 3 days' accumulated vacation pay. It is undisputed that at the close of this meeting Gammill displayed Rich's business card and in a sarcastic tone of voice said, "[T]hank you, Joe," or words to that effect.

Gammill testified that he told Horn that he was not doing his job anymore and had to be replaced. Gammill denied that the Union was mentioned. However, as Boyd did with respect to Kuck's discharge, Gammill blurted out the truth on the witness stand. Gammill testified as follows:

Q. What did you tell Horn when you fired him?

A. Well, I stayed up half the night figuring out how I was going to do it, because I'm that way. But when I found out what had happened, well, I just told him we didn't need him anymore, and it wasn't—he knew what it was about. His production wasn't there.

Q. Wait a minute. When you say—when you found out what had happened, what do you mean by that?

A. Well, I'm talking about the whole thing that developed like it did. The Union walked in on us, type of thing at the same time, and Joe came in after that, and here we go with the thing—the same thing.

Gammill's "here we go with the same thing" was an obvious reference to the fact that prior to its acquisition by Lamar Corporation, the employees at the Dayton plant had been represented by a union. I credit the testimony of Horn concerning his termination interview. I find that Gammill decided to fire Horn on learning that he was instrumental in organizing the Union and promptly carried out that decision. Gammill was furious at the prospect of unionization, but was particularly incensed at Horn because Gammill was about to offer him a particularly favorable wage scale. On learning of Horn's union activity, Gammill was obviously in no mood to proceed with this offer. Instead, Gammill chose to use the scheduled meeting with Horn as the vehicle for his discharge. Therefore Respondent violated Section 8(a)(3) and (1) of the Act by terminating Horn. I further find that Respondent, by Gammill, violated Section 8(a)(1) of the Act by indicating to Rich, in the presence of Ricky Kuck, that Horn would be fired because of his support for the Union. Kuck, who was himself discriminatorily terminated, enjoyed the status of an employee under the Act. There-

fore Gammill's statement constituted an unlawful threat of reprisal against a fellow employee.

E. The Election Campaign and the Termination of Carl Gray

1. The alleged 8(a)(1) violations

The Union filed its election petition on November 21 and the election was held on the afternoon of December 21. About December 1 the construction crew (Lewis Williams, Lewis Baker, Carl Gray, and Ron Tyree) were summoned to a meeting at which Gammill and Boyd were present. Boyd announced that the employees would receive a 25-cent-per-hour pay increase. No reason was given. Following this meeting, Gammill summoned Baker and Gray into his office and announced that they would receive an additional increase of 25 cents per hour because they had been working there a long time and had not recently received a raise. The Union was not mentioned at either meeting. Respondent had previously given the construction crew a general increase following Rick Boyd's injury in April 1979. Williams, who began working for Respondent in September, was given an increase on October 29. Respondent did not have a policy of granting pay increases at specific times or intervals. Gammill and Sales Manager Ward testified, in sum, that about this time the home office in Baton Rouge authorized funds for a full scale conversion to the short-handle method of billposting, that the construction crew was responsible for performing this work, and that management felt that the pay increases would be an incentive for the crew to perform their duties expeditiously. Their testimony is rendered somewhat suspect by the fact that about the same time Gammill also gave Dallas Farley a 25-cent-per-hour pay increase. Farley was one of two paint department employees, the other being Cliff Leininger, who was about to retire. In Farley's case, as will be discussed, Gammill's announcement was coupled with an appeal to reject the Union, and warnings of the consequences of unionization. The conversion program commenced in the summer of 1979 and was still in progress at the time of this hearing. If Respondent were interested in providing pay increases as a work incentive for its employees, then it is more probable that Respondent would have granted the increases in late October, when employee discontent became so clearly apparent. In light of the timing of the increases and the questionable nature of Respondent's explanation, as discussed above, I find that Respondent announced increases to its hourly paid employees in early December in order to dissuade them from voting for the Union. Respondent thereby violated Section 8(a)(1) of the Act.⁶

⁶ The billposting crew, who began the union campaign, received nothing. The complaint alleges (par. (5)(a)(ii)) that on or about November 22 the Company gave several of its employees an unscheduled wage increase. The General Counsel contends that this involved a \$1 bonus to the billposters. In fact, Bernie Horton testified that at "the meeting where Joe was released and Ricky Boyd became the immediate supervisor," i.e., the second meeting on October 29, Gammill announced that because the Company was short on billposters, there would be an incentive plan bonus of \$1 per board. Gammill testified that an increase was discussed at the October 29 meeting, but never implemented. As of October 29, the Company had no knowledge of the union organizational campaign. I find

During the week of December 10, Gammill summoned each of the unit employees individually into his office for the purpose of dissuading them from voting for the Union. Gammill testified that he made use of prepared documents and, in sum, that he made substantially the same presentation to each employee. If so, then Gammill could have saved himself a good deal of time by addressing the employees at a single meeting and then if necessary answering questions. However, the testimony of the employee witnesses called by the General Counsel indicates that in fact these one-on-one interviews were tailored to the particular situation of the individual employees and were designed to apply the maximum amount of pressure upon each employee. Gammill testified in sum that he told each employee that the only thing they could go by was what they had previously, that, if they thought the Union was beneficial, they should join, but that they should make sure they knew what they were doing, and that only Rich could give them the information they needed. Gammill further testified that he compared company conditions with union contracts elsewhere. However, Gammill failed to testify as to the arguments which he advanced against the Union, which were ostensibly the purpose of these interviews. For example, Gammill testified that after meeting with Cliff Leininger and Dallas Farley together he summoned Farley for an individual interview in order to go "a little more in detail." However, Gammill did not indicate the substance of this detail. Instead, Gammill simply denied the allegations of the complaint pertaining to these meetings; i.e., alleged interrogation, promises, and threats. Such terse denials have minimal evidentiary value when one is called on to resolve questions of credibility. Unless otherwise indicated, I credit the testimony of the employee witnesses concerning these meetings.

Gary Watson testified that Gammill questioned him as to whether he had any part in the Union, whether he was the main person, and whether Horton and Kuck were also involved. Watson admitted that he was involved, but asserted that there was much union talk among the employees. Gammill told Watson that there would be more opportunity to make money with the conversion to short handle and that the Company was considering a sick leave program. Gammill said that if the billposters went on hourly scale the Company would probably impose a production quota. Watson responded that it was negotiable. Gammill then countered: "Well, there will be a quota. I'll see to that in the contract if the Union is elected in." I find that the Company, through Gammill, violated Section 8(a)(1) by interrogating Watson concerning his union activities and that of his fellow employees, impliedly promising a sick leave program if the employees rejected the Union, and threatening imposition of a quota for billposters if the Union was voted in. I do not, as alleged in the complaint, find that Gammill threatened partial subcontracting of work. Although Gammill referred to subcontracting at another firm, he indicated "that wouldn't be possible" at Dayton. Gammill told Watson, in sum, that the Company had re-

that the matter was unrelated to the union campaign and, therefore, I am recommending that this allegation of the complaint be dismissed.

frained even from partial subcontracting but he did not indicate that unionization would change this policy.

Bernie Horton, Lewis Williams, and Carl Gray testified, in sum, that Gammill made unfavorable comparisons with union contracts at other locations, including Lamar facilities. Gammill asked Horton how they got in contact with "somebody from Cleveland," i.e., the Union, and Horton answered, "we called." Gammill asked Gray how he felt about the Union, but Gray avoided answering the question. I find that Respondent violated Section 8(a)(1) by systematically interrogating its employees about their union attitude and activities and that of their fellow employees. Indeed, the questioning met virtually every criterion suggested by Board and court decisions for determining the unlawfulness of such conduct. Painting department employees Cliff Leininger and Dallas Farley were initially summoned together to Gammill's office. Gammill proceeded to tell them the advantages of nonunion over union. Gammill took a carrot and stick approach. He told the employees that if the Union came in their retirement benefits would go "out the window" and that if they went home sick during the day, they would not be paid for the balance of the day. (As indicated, Leininger was about to retire.) Gammill then told Farley he was getting a 25-cent-per-hour raise because he was doing a good job. Later in the day Gammill summoned Farley alone to his office. During this second interview Gammill told Farley that if the Union came in there was a strong possibility that his job could be phased out or that he could take a cut in pay.⁷ Gammill added that if the Union came in, one man (unidentified) stood to gain while the rest would probably lose out. I find that Respondent, through Gammill, violated Section 8(a)(1) of the Act by threatening employees with loss of retirement benefits, loss of employment, loss of income, and more onerous working conditions if the employees selected the Union as their representative. I further find that Gammill's assurance that Farley was doing a good job, but that his job might be phased out if the Union came in, may properly be considered as evidence with respect to the subsequent alleged unlawful termination of Farley.

On December 19 Rick Boyd assembled all the unit employees to a meeting in the paint shop, which was conducted by Gammill. Employees Watson, Baker, and Williams testified concerning the meeting. I find Watson's account to be the most complete and accurate. Gammill talked about the equipment and the short handle procedure. Gammill said that he knew they had turned in cards for the Union, it was their decision, and he did not know if the Union would help them, but they should make sure they were doing the right thing. However, Gammill asserted that regardless, things would improve, that the short-handle method would be better for the employees, and that the Company was purchasing new equipment. Gammill further asserted that the employees

at Dayton previously had a union, but were dissatisfied and voted it out. I do not credit the testimony of Baker that at this meeting Gammill said that there would be a daily production quota for billposters. Despite leading questions from the General Counsel, Baker's testimony in this regard was not corroborated by either Watson or Williams. As indicated by Watson's testimony previously discussed, Gammill may have made such a statement to other billposters in the individual interviews. However, I am not persuaded that he did so at the December 19 meeting. As for Gammill's statement that he knew the employees had turned in union cards, Gammill was simply stating the obvious. Business Representative Rich had already made a claim for representation based on signed authorization cards from an overwhelming majority of the employees. Therefore, Gammill did not create the impression of surveillance of union activities and I am recommending that this allegation of the complaint be dismissed. I find that Gammill's December 19 presentation constituted permissible propaganda which did not violate the Act.

In the meantime, one day in December Lewis Baker, Bernie Horton, and Gary Watson (all of whom were then billposters) were having lunch when Rick Boyd approached them. Baker and Horton testified, in sum, that Boyd accused them of being responsible for bringing in the Union. According to Baker, Boyd asked them when and where was the next meeting and who was buying the beer. Watson did not testify about this conversation. However, he testified that Boyd asked him how it felt to be a big union man. Lewis Williams testified that on one occasion in early December, when he was at work in the shop folding posters, Boyd approached him and similarly asked when was the next meeting, and who was buying the beer. Williams testified that on other occasions Boyd asked him how he felt about the Union. Boyd, in his testimony, denied that he created the impression of surveillance of union activities, or interrogated employees regarding their union activities. However, he did not testify concerning the specific conversations described by the employee witnesses. As indicated, Boyd was demonstrably a less than credible witness in several crucial respects. In contrast I have less reason to disbelieve the employee witnesses. I credit the testimony of the employees. I find that Respondent through Boyd, violated Section 8(a)(1) of the Act in creating the impression of surveillance of union activities by accusing Baker, Horton, and Watson of being responsible for bringing in the Union, and further violated Section 8(a)(1) by interrogating employees concerning their union activities and that of their fellow employees.

On December 20, the day before the representation election, Gammill met with the three accused union activists (Baker, Horton, and Watson) in an informal beer drinking session in Rick Boyd's office. Boyd paid for the beer. Baker and Watson testified in sum that Gammill asked them for their problems and complaints. They told him. Gammill closed the conversation by saying that if they had any complaints in the future, they should feel free to come and talk to him, and his "door was always open." Horton and Boyd, who was also present, did not

⁷ In his investigatory affidavit, Farley stated that he had never been threatened about a union or his union activities. However, in the same affidavit Farley referred to Gammill's statement that his job might be phased out. Therefore the affidavit, when considered in its entirety, is not inconsistent with Farley's testimony as to what Gammill actually told him.

testify concerning what was said in the conversation. Gammill, in his testimony, denied the pertinent allegation of the complaint that, by soliciting employee complaints and grievances, he impliedly promised increased benefits and improved terms and conditions of employment if the employees rejected the Union. However, he did not deny the employees' testimony concerning what was said in the conversation. The employees' testimony indicates that Gammill did not make any express promises, other than to say that his door was always open. However, Gammill did not indicate that he was not making any promises. I find in light of the timing of this meeting that the Company, through Gammill, violated Section 8(a)(1) by impliedly promising the employees increased benefits and improved terms and conditions of employment if they rejected the Union. See *Merle Lindsey Chevrolet, Inc.*, 231 NLRB 478, fn. 2 (1977). In sum, Gammill was making a last ditch unlawful effort to stave off the prospect of unionization.

2. The discharge of Carl Gray

Carl Gray had been employed on the construction crew since October 1978. He could accurately be characterized as a fair to average employee. Gray generally performed his work in a capable manner. As indicated, Gammill gave Gray a 50-cent-per-hour pay increase in early December. On one occasion Gammill bought him a case of beer as a reward for bringing in a new prospective employee. Gray had a tendency to be tardy on occasion, but his record in this regard was not the worst among the Company's employees. On a few occasions Boyd had criticized his work. However, during his tenure of employment Gray was never singled out for discipline by reason of tardiness, absenteeism, drunkenness, or disorderly conduct.

Gray signed an authorization card during the organizational campaign. He testified that he attended one union meeting before his discharge on December 15 and that he talked in favor of the Union to other employees. However, he did not play a leading role in the campaign. Gary Watson testified that on one occasion in early December Rick Boyd was present when Gray said that "maybe the Union would be a better thing." In fact, there was much talk about the campaign among the employees in early December, most of it was favorable to the Union, and Boyd heard much of the conversations. As indicated, Gray avoided giving an answer when Gammill asked him about his attitude toward the Union. Gray testified that about December 10 Ron Tyree accused him of voting for the Union, i.e., signing a union card, and later asked him how he was going to vote in the election. Gray testified that he avoided answering Tyree. In fact, as was common knowledge in the plant by that time, nearly all of the employees had signed union authorization cards. In sum, as of December 15 Gray was not a likely candidate for a discharge on the basis of his union activity.

Saturday, December 15, was a mandatory overtime workday for the construction crew. The starting time was 7 a.m. Gray testified that on Friday evening he went out with his wife to celebrate their anniversary, that he was out until 2:30 to 3 a.m., drinking beer, and that he

overslept. Gray reported to the plant between 9 and 9:30 a.m. Gray testified that he was not drunk, but that Rick Boyd, who was at the plant, accused him of being drunk, and that he denied the accusation. Boyd refused to permit Gray to work that day. Gray then asked for his Christmas bonus check. Boyd told him to pick it up on Monday. Gray argued that the Company held up checks in order to force the employees to report in order to get their checks. Gray testified that at this point Boyd accused him of "going around here saying what you ain't going to do," and being late for the job. According to Gray, he protested that he was joking, whereupon Boyd became visibly angry, went into the office, brought Gray his bonus check, and told him to pick up his last paycheck on Friday. Gray, again arguing with Boyd, asked for his paycheck immediately. Boyd insisted that Gray pick up the paycheck on Friday and ordered him to leave the shop. According to Gray, Boyd told him that he was discharged for being drunk.

Rick Boyd testified that Gray came to work visibly drunk, that he was staggering, and had alcohol on his breath. According to Boyd, Gray demanded his bonus check and insisted that Boyd had no right to hold it. Boyd was equally adamant that he could hold the check until Monday. According to Boyd, Gray then swore at him, shook his finger, and said, "Your time's coming, buddy." Boyd responded that "if that's the way you feel about it, you can have your time now and I'll give you your check." He then discharged Gray. Boyd testified that the discharge had nothing to do with union activity. General Manager Gammill testified that on Monday Boyd informed him that he discharged Gray because he came to work late, drunk, and demanding his bonus, that Boyd had authority to take such action, that he agreed with the discharge and that Gammill had no knowledge that Gray favored the Union.

Boyd's version of the verbal exchange is not significantly different from that of Gray. It is evident that whether Gray arrived drunk, as testified by Boyd, or simply "hungover" as asserted by the General Counsel, Boyd determined that Gray was in no condition to work, or at least in view of the lateness of the hour and Gray's obvious condition, that there was no point in sending him to work in the field. If Boyd were seeking a pretext to discharge Gray, then he could have fired him when he came in. However, Boyd did not do so. He simply told Gray not to work that day. Gray did not leave. He asked for his bonus check, and even according to his own version of the exchange, persisted in arguing with Boyd after Boyd told him to pick up the check on Monday. At this point Boyd was placed in a position where he had to make an on-the-spot decision. Whether he made the right decision is not for me to decide.⁸ Rather the question presented is whether in deciding to fire Gray, Boyd was motivated in whole or part by Gray's union or other protected concerted activities. The evidence fails to establish that he was so motivated. Moreover, the election was less than a week away. It is

⁸ The General Counsel presented evidence concerning past employer disciplinary practices. However, none involved situations similar to that confronted by Boyd.

unlikely that at such a crucial time, Boyd would discharge an employee because of union activity without first obtaining Gammill's approval. The fact that Boyd acted on his own initiative, tends to indicate that he regarded the discharge as nondiscriminatory. Boyd was confronted by an impromptu situation which was brought about by Gray's own unprotected actions. I find that the General Counsel has failed to prove by a preponderance of the credible evidence that Respondent fired Gray because of his union or other protected concerted activities. Therefore I am recommending that this allegation of the complaint be dismissed.

F. Alleged Surveillance and the Termination of Dallas Farley

In October 1979 Respondent's paint department consisted of painter Cliff Leininger and painter's helper Mason Archie. On October 22 Respondent discharged Archie because of his poor attendance record. About November 1 Respondent hired Dallas Farley as a painter's helper. It is undisputed that Respondent regarded Farley as a satisfactory employee. Leininger, who was in the best position to evaluate Farley's performance, was not presented as a witness. However, General Manager Gammill, in his testimony, admitted that he received no complaints about Farley's work, that his attendance was good, and that he was good as a "helper." As indicated, Gammill told Farley in mid-December that he was giving him a raise because Farley was doing a good job. John Reed, who eventually took charge of inside operations after he returned to Dayton, testified that Farley seemed fairly capable for the time he had been there. However, Farley testified without contradiction that Leininger told him that his work was good and he was picking it up fast and that Rick Boyd told him (prior to Reed's return) that he did more work in 3 weeks than Archie did the whole time he was there. The painting work, which was performed at the plant, consisted of a process whereby a transparency was placed in a projector and projected onto the board, and the employee painted the advertisement by following the projection. Gammill testified that the work required some skill, a steady hand, and a knowledge of proportion and shading, but that the work was "mechanical" rather than "skilled," particularly with the improved "projectors we have right now." In sum, the work required a simple form of artistic ability (the absence of which would quickly become apparent) coupled with a period of on-the-job training.

Farley did not join the Union before the representation election. On the evening of January 9 the Union, which was now the certified bargaining representative of the Company's employees, conducted a meeting at a union hall in Dayton. About 12 employees, including Farley, attended the meeting, and business representative Rich presided. The principal purpose of the meeting was to discuss the Union's position in the forthcoming contract negotiations. Rich was engaged in informal conversation with some employees, but the meeting had not yet been called to order when Rick Boyd, Ron Tyree, and electrician Randy Arner came into the hall and sat down together. Joe Horn called Boyd's presence to the attention

of Rich. Rich asked Boyd to step into the corridor and Boyd did so. Rich asked Boyd if he had the right to hire and fire and Boyd answered that he did.⁹ Rich asked Boyd to leave the meeting because he was "management." Boyd returned to the meeting to inform Tyree and Arner that he was leaving. However, they, along with employee Tom Halsworth, chose to leave with Boyd. After they left the meeting proceeded. There was discussion of union stewards. Rich explained that there was an industry practice for the Union to have one inside and one outside steward. Farley's name was mentioned for the position of inside steward. Rich proposed Farley, who responded that he would "definitely take it under consideration."¹⁰

In the meantime Boyd and the others who left with him did not completely abandon the scene. They rode around and stopped for beer, waiting for the meeting to end. They returned to the meeting place and picked up employee Dave Johnson, who joined them for several hours of more drinking and driving around. Boyd testified that Tyree asked Johnson what went on. Randy Arner, who was presented as a company witness, testified that Johnson talked about what happened at the meeting, "some things good about it and some bad." Arner professed that he was unable to recall what Johnson said about the meeting. In light of the admissions by Boyd and Arner, and subsequent developments which will be discussed, I find that Johnson told them that Farley volunteered to be the inside union steward. I further find that Boyd went to the meeting in order to obtain information and to report such information to Gammill. Respondent, by Boyd, thereby violated Section 8(a)(1) of the Act by engaging in surveillance of union activities. At the least, Boyd's actions unlawfully created the impression of surveillance. Boyd was a supervisor, acted like a supervisor, and knew he was a supervisor. If prior to November 21 Boyd had neglected to report his suspicions about employee union activity, then he certainly learned from Gammill's outburst when Rich visited the plant, that Gammill expected him to keep Gammill fully informed on the progress of such activity.

On January 12 John Reed, Farley's immediate supervisor, told Farley that he would have to lay him off for lack of work, and that he "didn't see any more paint work down the pike." Farley testified that when he asked Reed about future prospects, Reed told him that if he got a job opportunity he should not turn it down. By letter dated January 31, Gammill informed Farley that he was being terminated as of that date. In garbled language, Gammill told Farley: "This termination was due to lack of work in the paint department and also indications that the lack of work in the paint department in the near future are not there."¹¹ Gammill further asserted

⁹ Boyd testified that he could not recall whether Rich asked this question. I credit Rich.

¹⁰ Farley testified that the matter was taken up after Boyd left. Rich testified at one point that they were discussing the designation of a steward when Boyd arrived. However, at another point he testified that the discussion took place after Boyd left. I find that the discussion took place after Boyd left with the others.

¹¹ The letter, if read literally, could be interpreted as stating that there would be work in the near future. Perhaps Gammill was trying to convey a message to Farley.

that the termination "had nothing to do with the quality of your work." Nevertheless, on February 25, less than a month after terminating Farley, and after considering alternative replacements, Respondent rehired Mason Archie. Gammill and Reed categorically testified in sum that they never considered recalling or rehiring Farley. According to Reed, they did not consider Farley because they needed someone who could do all of the work alone. In fact, Farley was about as well qualified as Archie and demonstrably a more productive and reliable employee. Gammill conceded that Archie was rehired as a "painter's helper." Cliff Leininger retired about May 15, leaving Archie as the only employee in the paint department. Nevertheless, Reed testified that when Reed left Dayton in June, Archie still "hadn't completely learned the job." Gammill testified that Archie's "going to be a good sign painter one of these days." As indicated, Gammill stated in his January 31 letter that Farley's termination had nothing to do with the quality of his work.

Gammill and Reed testified, in sum, that Gammill decided to lay off Farley because the paint department ran out of work. In fact, work was temporarily slow at that time and Farley was laid off for a few days in early January. However, such temporary slack was not unusual in midwinter. Leininger, because of his age and apparent physical limitations, needed an assistant. Moreover, the paint department did not exist in a vacuum. Respondent anticipated that the short handle method of billposting would lead to greater productivity. Respondent, which had never permanently laid off an employee for lack of work, had a policy of finding alternative work for its employees when work was slow in their own job category. Nevertheless, Gammill admitted that he never considered offering Farley a position in any other job classification. It is evident that Gammill regarded Farley as a better employee than Mason Archie, that he hired Farley with the intention that he would replace Leininger when Leininger retired, and that until learning of the union meeting on January 9, Gammill continued to anticipate that Farley would assist and eventually replace Leininger when he retired. However, on learning about the meeting, Gammill realized that he could deal the Union a severe blow by removing Farley from the plant. The Union needed an inside steward. Farley, an articulate individual, was the logical and possibly the only practical choice. Leininger, the other painter, was about to retire, and electrician Randy Arner was vocally opposed to unionization. In December, Gammill warned Farley that unionization could lead to the loss of his job, but Farley chose to ignore the warning by volunteering for the key position of inside steward. I find that Respondent laid off and terminated Farley because of his union activity and thereby violated Section 8(a)(3) and (1) of the Act.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. All full-time and regular part-time employees employed by Respondent at its Dayton, Ohio, location, ex-

cluding all office clerical employees, sales employees, professional employees, guards, and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. At all times since January 3, 1980, the Union has been and is the exclusive representative of all of the employees in the unit described above.

5. By failing and refusing to furnish the Union with requested information which is relevant and necessary to the Union's performance of its function as collective-bargaining representative, Respondent has engaged, and is engaging in, unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By discriminating in regard to the tenure of employment of Ricky Kuck, Joseph T. Horn, Jr., and Dallas Wayne Farley, thereby discouraging membership in the Union, Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(3) of the Act.

7. By interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act, Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(1) of the Act.

8. The allegation of the complaint that Respondent discriminatorily discharged Carl Gray has not been sustained by the evidence.

9. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has committed violations of Section 8(a)(1), (3), and (5) of the Act, I shall recommend that it be required to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent discriminatorily terminated Ricky Kuck, Joseph T. Horn, Jr., and Dallas Wayne Farley, it will be recommended that Respondent be ordered to offer each of them immediate and full reinstatement to their former jobs or, if they no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed, and make them whole for any loss of earnings that they may have suffered from the time of their discharges to the date of Respondent's offer of reinstatement.¹² The backpay for said employees shall be computed in accordance with the formula approved in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest computed in the manner and amount prescribed in *Flor-*

¹² None of the evidence presented warrants anything less than the usual remedy of reinstatement and backpay. Kuck's reference to being "screwed" was an expression of his own lawfully protected activities and did not render him unfit for future employment. As Gammill was prepared to offer Horn his present salary, which Horn wanted, the finding is warranted that but for his unlawful termination, Horn would have remained in Respondent's employ without any reduction in that salary. Moreover, Respondent by its unlawful action deprived Horn any doubt in the matter. Therefore any doubt in the matter must be resolved against the wrongdoing employer.

ida Steel Corporation, 231 NLRB 651 (1977).¹³ It will also be recommended that Respondent be required to preserve and make available to the Board or its agents, on request, payroll and other records to facilitate the computation of backpay due.

Additionally, I shall recommend that Respondent be ordered to furnish the Union with current information concerning rates of pay, wage data, and fringe benefits offered and paid by Lamar Corporation, its subsidiaries, and affiliates engaged in the business of outdoor advertising, for employees performing work in job categories which are comparable or identical to those in the bargaining unit. However, Respondent is not required to identify the recipients by name. Rather, reference to job categories or functions performed would constitute adequate compliance with this Order.

I find upon consideration of the facts of this case that the unfair labor practices proven herein are sufficiently broad in scope and intensive in nature as to demonstrate that Respondent has a general disregard or hostility to the Act. Respondent engaged in a pattern of unlawful conduct which extended over a period of several months and which included three discriminatory discharges and the refusal to comply with a basic obligation of collective bargaining. Respondent manifested a disregard of employee rights at every stage of self-organization beginning with the first collective efforts of its employees to obtain redress of their grievances, extending through the union organizational campaign, and continuing even after the Union established its representative status in a Board-conducted election. Therefore, I shall recommend that Respondent be ordered to cease and desist from infringing in any manner upon the rights guaranteed in Section 7 of the Act.

Upon the foregoing findings of fact and conclusions of law, and upon the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER¹⁴

The Respondent, Lamar Advertising Associates of Dayton d/b/a Lamar Outdoor Advertising, Dayton, Ohio, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in Local Union No. 639, Sign, Display & Allied Trades, AFL-CIO, or any other labor organization, by discriminatorily terminating employees, or in any other manner discriminating against them with regard to their hire or tenure of employment or any term or condition of employment.

(b) Discharging or disciplining employees for joining with their fellow employees in questioning or criticizing their terms and conditions of employment, or for otherwise engaging in protected concerted activities with regard to their terms and conditions of employment.

¹³ See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

¹⁴ In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(c) Telling employees that other employees will be terminated because of their union activities, or that the plant will never be a union shop, or that the employees have no right to know wage rates at other plants.

(d) Threatening employees with loss of jobs, less pay, loss of retirement benefits, or more onerous working conditions if they designate or select said Union or any other labor organization as their bargaining representative.

(e) Expressly or impliedly promising or announcing wage increases or other benefits in order to discourage support for said Union or any other labor organization.

(f) Interrogating employees concerning their union membership, attitude, or activities, or those of their fellow employees.

(g) Engaging in surveillance of union meetings or other union activities.

(h) Creating the impression of surveillance of employee union activity by accusing employees of engaging in such activity.

(i) Failing or refusing to bargain collectively with said Union as the exclusive collective-bargaining representative of all full-time and regular part-time employees employed by Respondent at its Dayton, Ohio, location (exclusive of all office clerical, sales and professional employees, and guards and supervisors as defined in the Act) by failing or refusing to furnish said Union with information which is relevant and necessary to its function as such representative.

(j) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them under Section 7 of the Act.

2. Take the following affirmative action which is found necessary to effectuate the policies of the Act:

(a) Offer Ricky Kuck, Joseph T. Horn, Jr., and Dallas Wayne Farley immediate and full reinstatement to their former jobs, or, if such jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed, and make them whole for losses they suffered by reason of the discrimination against them as set forth in the section of this Decision entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due.

(c) Promptly furnish said Union with current information concerning rates of pay, wage data, and fringe benefits offered and paid by Lamar Corporation, its subsidiaries and affiliates engaged in the United States in the business of selling and displaying outdoor advertising, for employees performing work in job categories which are comparable or identical to those in the above-described bargaining unit.

(d) Post at its Dayton, Ohio, place of business, copies of the attached notice marked "Appendix."¹⁵ Copies of

¹⁵ In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

said notice, on forms provided by the Regional Director for Region 9, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees

are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 9, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.